(1)

91-776

No. _____

In The

Supreme Court of the United States

October Term, 1991

STATE OF TENNESSEE,

Petitioner,

vs.

JAMES HOWARD TURNER,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the district court has the authority to order specific performance of an unaccepted plea offer as a remedy for ineffective assistance of counsel during plea negotiations.

Whether, if such authority exists, the State should be forced to overcome a presumption of vindictiveness before withdrawing its previously unaccepted plea offer.

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on August 7, 1991, and is cited at 940 F.2d 1000. This opinion appears as Appendix A.

The order of the United States Court of Appeals for the Sixth Circuit denying the petitioner's suggestion for rehearing was filed on October 21, 1991. This order appears as Appendix B.

A published opinion of the Court of Criminal Appeals of Tennessee was filed on January 16, 1986, and is cited at 713 S.W.2d 327.

The first published memorandum opinion and order of the United States District Court for the Middle District of Tennessee were filed on June 12, 1987, and are cited at 664 F.Supp. 1113.

The first published opinion of the United States Court of Appeals for the Sixth Circuit was filed on October 7, 1988, and is cited at 858 F.2d 1201.

This Court's order granting the State of Tennessee's petition for certiorari and remanding for further consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989), was filed on June 26, 1989, and is cited at 490 U.S. 803.

The order of the Sixth Circuit Court of Appeals remanding the case to the district court was filed on August 15, 1989, and is cited at 883 F.2d 38.

The second published memorandum opinion and order of the United States District Court for the Middle District of Tennessee were filed on December 14, 1989, and are cited at 726 F.Supp. 1113.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 7, 1991. This petition was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The respondent was indicted by the grand jury of Davidson County, Tennessee, for the 1980 murder of Monty Hudson and the aggravated kidnapping of Mr. Hudson and his wife, Elizabeth Hudson. Before trial, the prosecutor offered the respondent an opportunity to plead guilty to simple kidnapping and receive a sentence of two (2) years imprisonment. The respondent was advised by one of his attorneys to accept the offer. However, he took the advice of his other attorney, rejected the offer and chose to go to trial.

The respondent's hopes were frustrated when he went to trial on February 9, 1983. Upon his conviction of first-degree murder, he received a sentence of life imprisonment. For each of two convictions of aggravated kidnapping, he was sentenced to serve forty (40) years'

imprisonment. The state trial court ordered these sentences to be served concurrently.

The respondent then reassessed the State's plea offer and filed a motion for a new trial, alleging that counsel's advice to reject the offer violated his right to the effective assistance of counsel. On October 26, 1983, the state trial court granted the respondent a new trial, finding that the respondent had been denied the effective assistance of counsel because one of his two attorneys advised him to reject the plea offer.

On August 7, 1984, the Tennessee Court of Criminal Appeals affirmed the grant of the new trial, and the case was remanded. *State v. James Howard Turner,* Davidson Criminal, C.C.A. No. 83-278-III (opinion released August 7, 1984, at Nashville). The Tennessee Supreme Court denied the state's application for permission to appeal on December 14, 1984.

On remand, the prosecutor reopened negotiations and offered the respondent a sentence of twenty (20) years upon a plea of guilty to aggravated kidnapping. The respondent offered to plead guilty to simple kidnapping, with a maximum sentence of ten (10) years. Negotiations ended when no agreement could be reached.

The respondent then filed a motion in the trial court seeking reinstatment of the offer or dismissal of the indictment. The state trial court granted the motion, finding that a new trial would not effectively remedy the alleged denial of the effective assistance of counsel. However, the trial court specifically found that the prosecutor's offer of twenty (20) years was not tainted by vindictiveness.

The State then filed an application for an extraordinary appeal by permission in the Tennessee Court of Criminal Appeals, which granted the application, reversed the judgment of the trial court and remanded the case for a new trial. *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986). The Tennessee Supreme Court denied the respondent's application for permission to appeal on June 2, 1986. The respondent's petition for the writ of certiorari in this Court was denied on November 3, 1986. *Turner v. Tennessee*, 479 U.S. 933 (1986).

On February 25, 1987, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee. Finding that a presumption of prosecutorial vindictiveness applies to any plea offer greater than the original offer, the district court granted habeas corpus relief. *Turner*, 664 F.Supp. at 1126. The judgment of the district court was affirmed by the United States Court of Appeals for the Sixth Circuit. *Turner*, 858 F.2d 1201 (6th Cir. 1988).

On December 6, 1988, the petitioner filed a petition for the writ of certiorari in this Court. The petitioner asserted that the courts below erroneously applied a presumption of prosecutorial vindictiveness since the prosecutor's new plea offer embodied a substantial reduction in the charges as well as the permissible punishment for such charges.

On June 26, 1989, this Court granted the petition, and remanded the case for further consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989). *Tennessee v. Turner*, 490 U.S. 803. The Court below, in turn, remanded the case

to the district court on August 15, 1989. *Turner v. Tennessee*, 883 F.2d 38 (6th Cir. 1989).

The district court filed its second opinion on December 14, 1989, *Turner v. Tennessee*, 726 F.Supp. 1113 (M.D. Tenn. 1989). This time, the district court disregarded the claim of vindictiveness, relied upon Sixth Amendment grounds and ordered the petitioner to reinstate its previously rejected plea offer of two years. Since the order on remand allowed no opportunity to withdraw the offer or show a lack of vindictiveness, the State was left in a worse position than it was in before it successfully appealed to this Court.

Upon the State's second appeal, the Court of Appeals rejected the district court's alternative ruling, but affirmed the judgment on the basis of its earlier ruling. *Turner v. Tennessee*, 940 F.2d 1000 (6th Cir. 1991). After holding that *Alabama v. Smith* does not apply to prosecutors, the court below held that the State could not withdraw its previously unaccepted plea offer without first overcoming a presumption that it was acting vindictively. Having lost any benefit which it hoped to obtain in negotiations, the State must nonetheless extend its original offer unless it overcomes the presumption.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents an important question of federal law regarding the power of the federal courts to control the discretion of state prosecutors in plea bargaining. By ordering the state prosecutor to reinstate an offer which was withdrawn before

acceptance, the court below has exceeded the proper scope of federal power under *Santobello v. New York*, 404 U.S. 257 (1971) and *Mabry v. Johnson*, 467 U.S. 504 (1984).

Furthermore, the decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit upon the same issue presented in this petition. *United States v. Osif*, 789 F.2d 1404 (9th Cir. 1986). The decision also represents a split within the Sixth Circuit upon this issue, in that the lower court has approved without opinion a district court decision that attorney error which denies a defendant an opportunity to plea bargain does not result in the denial or infringements of his constitutional rights. *Ball v. United States*, 653 F.Supp. 44 (E.D. Tenn. 1985), *aff'd* 805 F.2d 1036. The conflict between *Ball* and the opinion below is especially troubling since it suggests that state criminal proceedings are to be governed by a higher standard than federal proceedings.

I. THE DISTRICT COURT HAS NO AUTHORITY TO ORDER SPECIFIC PERFORMANCE OF AN UNACCEPTED PLEA OFFER AS A REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS.

The district court's order on remand directed the State to present its previously rejected plea offer of two years' incarceration. 726 F.Supp. at 1118. On appeal, the State asserted that the district court had no authority to order specific performance of an unaccepted plea offer. Brief of Appellant, p. 10. Although the Court of Appeals mitigated the impact of the district court's opinion, it nonetheless exceeded the proper scope of habeas corpus

by imposing limits upon the prosecutor's decision to rescind the unaccepted plea offer.

In its original opinion, the Sixth Circuit noted that remedies for deprivation of the right to effective assistance of counsel should be "tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). 858 F.2d at 1207. The proper approach is "to identify and then neutralize the [constitutional violation] by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." 449 U.S. at 365. This opinion formed the basis for the lower court's opinion after remand. 940 F.2d at 1001.

As a matter of proper analysis, tailoring a remedy first requires that the alleged constitutional violation be identified. Although there may be rights without remedies, there should be no remedy without first specifying the right implicated. Throughout these proceedings, the courts have assumed that the right to assistance of counsel was violated even though no court has found that counsel's error affected the outcome of the subsequent trial. The decisions of this Court, however, suggest that the right to counsel has been read too broadly.

The respondent has no right to engage in plea negotiations, no right to a particular offer, and no right to acceptance of the plea agreement by the state trial court. *See Mabry v. Johnson*, 467 U.S. 504 (1984); *Santobello v. New York*, 404 U.S. 257 (1971). Accordingly, the courts below erred in attaching constitutional significance to a mere

plea offer which could be withdrawn before its acceptance by the trial court, and where there was no detrimental reliance upon the plea offer.

The State does not suggest that the right to counsel cannot be implicated in plea negotiations. If attorney error during negotiations resulted in the development of evidence admissible at trial, the loss of defenses or the loss of trial rights, *see, e.g., Coleman v. Alabama*, 399 U.S. 1 (1970), the impact of the error at trial would implicate the Sixth Amendment. When the error results in the loss of no right and does not affect the trial, however, it does not rise to the level of a constitutional violation.

Critical stage analysis requires the courts to scrutinize the pretrial confrontation to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial. *Id.* Although plea negotiations offer an opportunity to avoid trial, defective negotiations generally have no effect upon the fairness of the trial which follows

In this context, counsel's error cost the respondent only an opportunity to which he was not constitutionally entitled. The State was free to refuse to negotiate or to negotiate upon whatever terms it saw fit. Since there was no demonstrated impact upon the subsequent trial, negotiation for the purpose of avoiding trial is not a critical stage of the trial.

Recently, this Court has held that a prisoner cannot complain of constitutionally ineffective assistance of counsel in post-conviction proceedings since there is no constitutional right to counsel in such proceedings. *Coleman v. Thomspon*, ___ U.S. ___, 111 S.Ct. 2546, 2566 (1991).

In the context of plea negotiations, there is no right to negotiate, much less a right to an attorney for purposes of negotiations. Absent such a right, any error by counsel does not require a constitutionally mandated remedy.

If this Court determines that the respondent has a right to counsel which was violated during plea negotiations, the question remains whether ordering the prosecutor to reinstate an earlier offer is a narrowly tailored remedy for the violation. A plea bargain is contractual in nature, and is measured by contract law standards. *United States v. Reed*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835, 107 S.Ct. 131 (1986), *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667 (1986). "For the equitable remedy of specific performance to be granted there must be a valid and enforceable contract." J. Calamari & J. Perillo, *Contracts*, §16-8 (1977), *citing* Restatement of Contracts §358, Comment e.

Even when a plea agreement exists, and the prosecution has breached it, the federal courts do not have the authority to order specific performance of the agreement. The federal courts lack the supervisory authority to specify the remedy for a state prosecutor's breach of a plea bargain. *Santobello v. New York*, *supra*, 404 U.S. at 262-263. The Constitution does not compel the grant of specific performance. *Mabry v. Johnson*, 467 U.S. 504, 509 n. 11 (1984). The most logical conclusion flowing from *Mabry* is that the district court has no authority to order the prosecutor to reinstate the rejected plea when he was not "negligent," "culpable," or otherwise responsible for the rejection of the offer.

The lower courts' grant of specific performance of an unconsummated plea offer will "unnecessarily infringe on competing interests," and is thus not warranted or appropriate. *Morrison, supra,* 449 U.S. at 364. Moreover, the relief ordered is not tailored in terms of providing the respondent a fair trial, but rather gives him a means of avoiding trial without compensating the State for its loss of the benefits it sought through negotiation.

The lower courts' error is underscored by the fact that the prosecutor was not responsible for counsel's error: "The state of Tennessee, as prosecutor, has done nothing improper to bring about that state of affairs." *Turner v. Tennessee,* 858 F.2d 1201, 1209 (6th Cir. 1988) (Ryan, J., concurring in part and dissenting in part). Thus, "[t]he government is not responsible for, and hence will not be able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland v. Washington,* 466 U.S. 668, 693 (1984). Furthermore, the State has lost any benefit it hoped to obtain from the original offer even though the defendant had a fair trial with an opportunity for acquittal.

In summary, the Constitution does not guarantee a defendant the right to engage in plea negotiations or a particular disposition of his case. Since the remedy accorded by the state courts, i.e., a new trial, carries with it the assurance that the respondent will receive the effective assistance of counsel, the district court erred in determining that the respondent is constitutionally entitled to reinstatement of the previously rejected two-year plea offer. Accordingly, the judgment granting the respondent habeas corpus relief must be reversed.

II. THE STATE SHOULD NOT BE FORCED TO OVERCOME A PRESUMPTION OF VINDICTIVENESS BEFORE WITHDRAWING ITS PREVIOUSLY UNACCEPTED PLEA OFFER.

The Court of Appeals has determined that the State is presumptively vindictive for failing to reinstate its original plea offer even though the prosecutor has tendered a new plea offer embodying a substantial reduction in the charges pending against the respondent and the permissible punishment for such charges. Although *Alabama v. Smith* considered the question of judicial vindictiveness, its reasoning applies with equal force when a prosecutor seeks a harsher sentence after having lost the very benefits which originally prompted the lenient offer. "[A]fter trial, the factors that may have indicated leniency are no longer present." 490 U.S. at 801.

Although a judge may gain more new information from a trial than the prosecutor, 940 F.2d at 1002, the lower courts' reasoning ignores the reality that all involved learn something when a case goes to trial. The State learned that its witness would endure and that earlier apprehensions were misplaced. The defendant learned that the State's proof was stronger than he thought. When the prosecutor has lost his only motive for offering leniency, the circumstances do not indicate the realistic likelihood of vindictiveness which is necessary before the presumption applies. *United States v. Goodwin*, 457 U.S. 368 (1982).

The Court of Appeals has fashioned a remedy which represents a substantial intrusion into the exercise of

prosecutorial discretion. To remedy an alleged due process violation, the Court of Appeals has effectively ordered specific performance of a plea offer which was withdrawn before acceptance unless the State carries the burden of proving a non-retaliatory motive.

The petitioner recognizes the proposition that where a convicted defendant has successfully availed himself of his statutory or constitutional rights to obtain direct or collateral relief from his conviction, the prosecution may not institute additional or more severe charges against the defendant which pertain to the same criminal episode in order to punish the defendant for exercising his rights or to discourage other defendants from exercising their rights. *See, e.g., Goodwin, supra; Blackledge v. Perry,* 417 U.S. 21 (1974); *North Carolina v. Pearce,* 395 U.S. 711 (1969).

While a presumption of vindictiveness may apply where the prosecution institutes additional or more severe charges against a defendant, such a presumption should not apply in circumstances where the prosecution's conduct amounts to nothing more than pursuing the original criminal charges upon rejection of the offer. *See, e.g., Vardas v. Estelle,* 715 F.2d 206, 213 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1208, 1215 (9th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983). The threat to try a defendant upon the original indictment is implicit in any plea negotiation.

In the case at bar, the prosecutor did not institute additional or more severe charges against the respondent. Rather, by tendering a twenty (20) year plea offer, the prosecutor actually reduced the charges pending against the respondent from first-degree murder and two (2)

counts of aggravated kidnapping to one (1) count of aggravated kidnapping. In offering the respondent this particular bargain, the prosecutor also dramatically reduced the permissible range of punishment for these charges from three (3) consecutive terms of life imprisonment to a mere twenty (20) years' incarceration. Under these circumstances, it cannot be said that the prosecutor's conduct following reversal of the conviction represented an adverse change in the charging decision following the initial trial. 457 U.S. at 383.

In *United States v. Osif*, 789 F.2d 1404 (9th Cir. 1986), the defendant successfully appealed his conviction of murder. On remand, the prosecutor offered a sentence of fifteen (15) years upon a plea to second degree murder, whereas the pretrial offer was for ten (10) years. Under the circumstance, the court rejected the claim of prosecutorial vindictiveness:

> [T]he vindictive prosecution doctrine does not apply when neither the charge's severity nor the sentence is increased. [Citations omitted]. Here, neither the sentence nor the charge was increased. Rather, the government merely refused to reoffer, after an intervening conviction for first-degree murder, as lenient a bargain as was previously rejected by Osif prior to trial.
>
> Further, vindictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action. [Citations omitted]. Osif's intervening first-degree murder conviction, . . . , is an intervening circumstance that properly could cause the prosecutor to view a new plea offer in a different

> light. Under any standard of review, we cannot find government vindictiveness.

Id., at 1405.

While the rationale of *Osif* is persuasive and better reasoned than that of the court below, there are other reasons which compel the conclusion that there is no reasonable likelihood of vindictiveness on the part of the prosecutor in tendering a plea offer involving more that two (2) years incarceration. Most significantly, the concept of prosecutorial vindictiveness is foreign to the plea bargaining process, where both parties possess relatively equal bargaining power and where the respondent is free to accept or reject the prosecutor's offer without exposing himself to greater or additional charges. *See Bordenkircher v. Haynes*, 434 U.S. 363, 365 (1978).

Moreover, the prosecutor's desire to forego a jury trial by engaging in plea negotiations (despite knowledge that he could, in fact, convict the respondent of first-degree murder and two (2) counts of aggravated kidnapping) is constitutionally legitimate where there is no dispute but that the respondent is properly charged with first-degree murder and two (2) counts of aggravated kidnapping. *Id.*

For these reasons, the petitioner submits that the Court of Appeals erred in according a mere plea offer constitutional significance by applying a presumption of prosecutorial vindictiveness to any subsequent plea offer greater than the original, unconsummated offer of two (2) years.

CONCLUSION

For these reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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No. 90-5109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES H. TURNER, *Petitioner-Appellee,*	)	ON APPEAL from the United States District Court for the Middle District of Tennessee
v.	)	
STATE OF TENNESSEE, *Respondent-Appellant.*	)	

Decided and Filed August 7, 1991

Before: KEITH, MARTIN, and RYAN, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. RYAN, Circuit Judge, (pp. 6-9) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. In our prior decision in this case we held that the due process clause of the fourteenth amendment requires the State of Tennessee to provide a showing that the withdrawal of a former plea offer to a habeas corpus petitioner who was unconstitutionally deprived of effective assistance of counsel at the pre-trial stage was free of a reasonable apprehension of prosecutorial vindictiveness. *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988). The United States

Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989), in which the Court found no judicial vindictiveness "where a second sentence imposed after a trial is heavier than a first sentence imposed [by the same judge] after a guilty plea." *Id.* at 875. On remand, the district court concluded that the *Alabama v. Smith* analysis should have no effect on the present case, but ultimately relied on other grounds in making its decision. We agree with the district court that *Alabama v. Smith* does not apply, and therefore affirm the district court's original opinion, 664 F. Supp. 1113, on that basis.

Because the facts of this case have been set forth in two prior opinions, *Turner v. Tennessee*, 664 F. Supp. 1113 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), we state only the essential facts. At some time prior to February 9, 1991, the State of Tennessee, through Assistant District Attorney General John Zimmerman, offered James Turner a two-year prison term in return for a guilty plea to simple kidnapping for the abduction and murder of Monte Hudson. On the unconstitutionally ineffective advice of counsel, Turner declined. Turner was thereafter tried and convicted of one count of felony murder and two counts of aggravated kidnapping. He was sentenced to life imprisonment for murder plus forty years for each kidnapping count.

Turner was granted a new trial on the grounds that he had received ineffective assistance of counsel in deciding to reject the two-year plea offer. Plea negotiations were reopened; however, Assistant District Attorney General Zimmerman, again representing the interests of

the State of Tennessee, refused to offer Turner a plea bargain of less than twenty years imprisonment. After exhausting all possible state remedies, Turner sought relief from the United States District Court for the Middle District of Tennessee. The district court determined that the appropriate remedy for the deprivation of Turner's sixth amendment rights would be a new plea hearing during which a rebuttable presumption of prosecutorial vindictiveness would attach to any plea offer made by the State in excess of its original two-year offer. A prior panel of this court affirmed the district court's decision. We now reconsider that holding in light of *Alabama v. Smith*.

We find *Alabama v. Smith* to be inapplicable to the present case because the controversy before us was neither borne of the same circumstances nor would it satisfy the rationale underpinning the *Alabama v. Smith* holding. *Alabama v. Smith* addressed the appropriate standard for determining the possibility of vindictiveness on the part of a sentencing judge where that judge had previously imposed a lesser penalty pursuant to a guilty plea. In *Smith*, the trial judge sentenced the defendant to two concurrent terms of thirty years imprisonment under the terms of a plea agreement between the prosecution and the defendant. 490 U.S. at 796. Under that agreement, a third charge was dropped. Thereafter, Smith successfully challenged the validity of his guilty plea and was tried on the original three charges before the same trial judge. *Id.* Smith was convicted of all the charges against him and was sentenced to two concurrent terms of life imprisonment and one consecutive term of 150 years imprisonment. *Id.*

Smith challenged his increased sentence because of the reasonable likelihood of vindictiveness on the part of the sentencing judge, similar to that found in *North Carolina v. Pearce*, 395 U.S. 711 (1969) (presumption of judicial vindictiveness arises where defendant receives greater penalty upon reconviction after the first conviction has been overturned on appeal and remanded for a new trial). The Supreme Court rejected Smith's challenge stating,

> [w]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. . . . As this case demonstrates, in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present.

Alabama v. Smith, 490 U.S. at 801 (citations omitted).

These factors distinguish *Alabama v. Smith* from the Court's holding in *Pearce* because

> [t]here, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after

> the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness.

Alabama v. Smith, 490 U.S. at 802.

At the most cursory level, the case before us is easily distinguishable from *Alabama v. Smith* because it involves a question of prosecutorial rather than judicial vindictiveness. The Court in *Alabama v. Smith* simply did not speak to prosecutorial conduct other than to reiterate in a footnote that a realistic likelihood of vindictiveness is necessary before a presumption of prosecutorial vindictiveness can be applied. *Id.* at 873 n.3; *see also United States v. Goodwin*, 457 U.S. 368 (1982) (discussing criteria for determining when a realistic likelihood of prosecutorial retaliation exists). We find nothing in *Alabama v. Smith* to disturb the Court's prior holding in *Goodwin*, and therefore our position remains consistent that *Goodwin* requires a presumption of prosecutorial vindictiveness in this case. *Turner v. Tennessee*, 858 F.2d at 1208.

At a more meaningful level however, the present case is not only factually distinct from *Alabama v. Smith*, but logically distinct as well. The concern stated by the Court in *Smith* – that a sentencing judge be free to weigh the various factors that come to light during a trial which may not have been revealed at the pre-trial stage – does not arise in this case. The prosecution is unlikely to gain any new insight as to the moral character of the defendant, the nature and extent of the crime, or the defendant's suitability for rehabilitation at the conclusion of trial that it did not already possess from its extended investigation. Rather, the prosecution in such circumstances "can be expected to operate in the context of

roughly the same sentencing considerations . . . ; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness." *Alabama v. Smith*, 490 U.S. at 802.

For the foregoing reasons, we find our prior decision in this case to be unaffected by *Alabama v. Smith*, and therefore affirm the judgment of the district court that the case be returned to the state forum where the prosecution may rescind its original plea offer only upon overcoming a presumption of vindictiveness.

RYAN, Circuit Judge, dissenting. We have obediently given this case "further consideration in light of *Alabama v. Smith*, 490 U.S. [794] (1989)," only to conclude, unanimously, that *Smith* casts no new light on the issues addressed in *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988). The majority has reiterated its judgment that at the new plea hearing to be held in the state court, a rebuttable presumption of vindictiveness will attach to any sentence bargain offer made by the state in excess of its original offer of a two-year sentence cap.

In my separate opinion, concurring in part and dissenting in part, in *Turner, supra*, I expressed agreement with the district court's judgment that a writ of habeas corpus should issue in this case and found no fault with the remedy – a show cause hearing – that the district court fashioned in order to rectify the constitutional violation that occurred. I stated further, however, that I could not agree with the district court and the *Turner* majority that at the new plea hearing a presumption of vindictiveness should attach to the state's twenty-year

plea bargain offer or to any offer by the state for confinement in excess of two years. I continue to be of that mind and, for the reader's convenience, restate here a portion of what I wrote in *Turner, supra:*

> I cannot agree with the district court's determination that a presumption of vindictiveness should attach to the state's twenty-year plea bargain offer. There is not the slightest indication in this record that the state's offer to the defendant to recommend that the trial court accept a plea of guilty to one count of aggravated robbery with a maximum sentence of twenty years' confinement is vindictive action taken as a means to punish the defendant for successfully appealing his conviction and seventy-year sentence.
>
> The unique facts of this case warrant the unique relief we have approved – a hearing at which the state is required to show cause why its former offer of a two-year maximum sentence should not be reinstated. But nothing in this court's opinion or the district court's suggests a valid reason for further burdening the state's position by imposing a judge-made presumption, albeit rebuttable, that the state's twenty-year plea offer is vindictive. The controlling Supreme Court authorities for determining whether a presumption of vindictiveness should be judicially imposed make clear that "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness.' " *United States v. Goodwin,* 457 U.S. 368, 384 [] (1982); *Blackledge v. Perry,* 417 U.S. 21, 27 [] (1974). There is no such realistic likelihood

in this case. The state originally had a compelling reason for making the inordinately lenient offer to Turner of a two-year plea: the concern that the prosecution would fail because Mrs. Hudson, one of the kidnapping victims, was "apprehensive about testifying again at the Turner trial," since she had already been through the unpleasant experience of testifying against Turner's co-defendant, Passarella. Apparently Mrs. Hudson's family also shared her reluctance to face the ordeal of another trial. Through no fault of the state of Tennessee, that early lenient offer was rejected by the defendant and the state was required to proceed to trial, risking the possibility of losing the case entirely if Mrs. Hudson's "apprehensiveness" hardened into non-cooperation. As it turned out, it did not. She testified against Turner, and he was convicted of two counts of kidnapping and one count of murder in the first-degree.

The convictions and the seventy-year sentence that resulted have now been set aside. The defendant, save for the unconstitutional ineptness of his retained counsel, would ordinarily be entitled to no more than a trial with the prospects of acquittal and freedom on the one hand, or a conviction and confinement for any number of years up to life on the other. The state of Tennessee, as prosecutor, has done nothing improper to bring about that state of affairs. The compelling motivation it once had to "give away the store," in the form of a two-year plea agreement, no longer exists, however. Nevertheless, the state has offered to allow Turner to plead guilty to a single count of aggravated kidnapping rather than the two counts of aggravated kidnapping and one of murder in the first

> degree, and to recommend a sentence of not more than twenty years. Whether Tennessee should be permitted to rescind its previous two-year plea offer in favor of its present twenty-year offer is a matter to be resolved by the state trial judge. No reason has been shown, however, to justify imposing upon the proceedings a judicial determination that the offer the state presently has on the table reflects presumptively vindictive retaliation against the accused for proving that he was the victim of the unconstitutional ineffectiveness of his retained counsel.
>
> I would return the proceedings to the trial court for a hearing requiring the state of Tennessee to show cause why the original two-year plea offer should not be reinstated, but without the application of any presumption in the matter because it is evident from the record before us that the state's twenty-year plea offer does not "pose a realistic likelihood of vindictiveness." *Goodwin, supra; Blackledge, supra.*

Turner, 858 F.2d at 1209-10.

No light is cast by the Supreme Court's *Smith* decision upon what the majority has approved in this case because the facts of the two cases are so distinctly different. *Smith* involves application of a vindictiveness presumption to judicial action, whereas here, the majority approves application of a vindictiveness presumption to executive discretion – a plea bargain offer. Nothing in the *Pearce/Goodwin/Blackledge* jurisprudence justifies applying a presumption of vindictiveness to the government's discretionary authority to offer or not to offer a plea bargain, as it wished.

No. 90-5109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES HOWARD TURNER, Petitioner-Appellee,	)	ORDER
v.	)	(Filed Oct. 21, 1991)
STATE OF TENNESSEE, Respondent-Appellant.	)	

BEFORE: KEITH, MARTIN and RYAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991
NO. 91-776

THE STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

MOTION TO RESPOND IN FORMA PAUPERIS

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40 pp

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991
NO. 91-776

THE STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

MOTION TO RESPOND IN FORMA PAUPERIS

Respondent, JAMES HOWARD TURNER, by his undersigned counsel, moves this Court for leave to file a response to the State of Tennessee's Petition for Writ of Certiorari in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. Respondent's affidavit of indigency is attached hereto in support of the instant motion.

Respectfully submitted,

Edward M. Yarbrough
EDWARD M. YARBROUGH

J. Russell Heldman
J. RUSSELL HELDMAN

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Motion has been forwarded to C. Anthony Daughtrey, Assistant Attorney General, 450 James Robertson Parkway, Nashville, TN 37219, this 17 day of December, 1991.

J. Russell Heldman

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991
NO. 91-776

THE STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

AFFIDAVIT

I, JAMES HOWARD TURNER, being first duly sworn according to law do hereby make oath and state that I have personal knowledge of the following and that the following is true:

1. I am the Respondent in the above-entitled case. In support of my motion to respond in this Court in forma pauperis I state that because of my poverty I am unable to pay for the printing of a brief in response to the pending Petition for Writ of Certiorari or costs of the instant proceeding.

2. The responses which I have made to the questions and instructions which follow relating to my ability to pay costs are true.

3. Are you employed? No.

4. Have you received within the past twelve (12) months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No, my family has provided me with financial assistance.

5. Do you own any cash or checking or savings account? Yes, I have approximately One Hundred Dollars ($100) cash.

6. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes, I own two older motor

vehicles and a travel trailer, none of which has any significant market value.

7. List the persons who are dependent upon you for support and state your relationships to those persons? My son, Bret Turner, 22, who was recently severely injured in an automobile accident with no insurance to cover his bills.

8. I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

FURTHER AFFIANT SAITH NOT.

James Howard Turner
JAMES HOWARD TURNER

SWORN TO AND SUBSCRIBED before me

this 11th day of December, 1991.

Linda B. Coe
NOTARY PUBLIC

My Commission Expires:

3-25-95

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Affidavit has been forwarded to C. Anthony Daughtrey, Assistant Attorney General, 450 James Robertson Parkway, Nashville, TN 37219, this 13 day of December, 1991.

Edward M. Yarbrough

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989
NO. 91-776

STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I. THE FIRST ISSUE RAISED BY THE STATE OF TENNESSEE IS NOT PROPERLY BEFORE THE COURT, WAS NOT AN ISSUE ADDRESSED BY THE JUDGMENT OF THE COURT OF APPEALS FROM WHICH THE PETITION FOR WRIT OF CERTIORARI HAS BEEN MADE, AND WAS NOT RAISED AT ALL IN THE UNITED STATES SUPREME COURT IN THE STATE'S PRIOR PETITION FOR WRIT OF CERTIORARI FROM WHICH THE COURT ORDERED A REMAND FOR CONSIDERATION IN LIGHT OF ALABAMA V. SMITH, 490 U.S. 794, 109 S.CT. 2201, 104 L.ED. 2D 865 (1989).

The State of Tennessee has raised two questions or issues in its Petition for Writ of Certiorari. The first stated in the State's petition is as follows:

> "Whether the district court has the authority to order specific performance of an unaccepted plea offer as a remedy for ineffective assistance of counsel during plea negotiations."

This issue is not properly before the Court as the record of the federal court proceedings clearly demonstrate.

In Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988), the Sixth Circuit Court of Appeals affirmed the determination of the Middle District Court of Tennessee in Turner v. Tennessee, 664 F. Supp. 1113 (M.D. Tenn. 1987), "[t]hat the appropriate remedy for the deprivation of Turner's Sixth Amendment right would be a new plea hearing during which a rebuttable presumption of vindictiveness would attach to any plea offer made by the State in excess of its original two-year offer." 858 F.2d at 1204.

As indicated in this prior opinion of the Sixth Circuit Court of Appeals, the State of Tennessee made no argument at that time to raise an issue of whether a federal district court has the authority to order "specific performance" of a plea offer which was rejected because of ineffective assistance of counsel at plea bargaining. See, Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988).

After the Sixth Circuit Court of Appeals first ruled in 1988, the State of Tennessee filed its first Petition for Writ of Certiorari in this Court and in that petition the State of Tennessee raised only one (1) question or issue for review. That question or issue as stated by the State of Tennessee on the first page of its first Petition for Writ of Certiorari was as follows: "Whether a presumption of prosecutorial vindictiveness is applicable where the prosecutor has tendered the respondent a plea offer embodying a substantial reduction in the charges pending against the respondent and the permissible punishment for such charges?" See the State of Tennessee's first Petition for Writ of Certiorari, Exhibit 1 to this Response, and Mr. Turner's original response, Exhibit 2 to this Response.

No other issues were raised in this Court by the State of Tennessee's first petition upon which this Court entered an order remanding the case "for further consideration in light of Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed. 2d 865 (1989)."

Upon remand, the District Court considered its original determination in light of Alabama v. Smith and concluded that the

Alabama v. Smith analysis should have no effect on its prior determination. Turner v. Tennessee, 726 F. Supp. 1113, 1115-1116 (M.D. Tenn. 1989).

The State of Tennessee appealed this second judgment of the District Court to the Sixth Circuit Court of Appeals wherein the only issue before the Court of Appeals was whether Alabama v. Smith should apply to change the prior decision of the Court of Appeals "[t]hat the due process clause of the 14th Amendment requires the State of Tennessee to provide a showing that the withdrawal of a former plea offer to a habeas corpus petitioner who was unconstitutionally deprived of the effective assistance of counsel at the pre-trial stage was free of a reasonable apprehension of prosecutorial vindictiveness." Turner v. Tennessee, 940 F.2d 1000, 1000-1001 (6th Cir. 1991).

In the Sixth Circuit's August 7, 1991, opinion, both the majority and dissent found Alabama v. Smith to be inapplicable to the Turner case because the controversy "was neither borne of the same circumstances nor would it satisfy the rationale underpinning the Alabama v. Smith holding." 940 F.2d at 1001 and 1002. Both majority and dissent also found that the Turner case is distinguishable from Alabama v. Smith and for the reasons stated in its opinion "is not only fashionably distinct from Alabama v. Smith, but logically distinct as well." 940 F.2d at 1002.

From this judgment the State of Tennessee has filed its second Petition for Writ of Certiorari. In it, the State has erroneously and without authority raised an issue which was not raised at all

in its first Petition for Writ of Certiorari and which was in no way governed by the order of this Court wherein the case was remanded for consideration in light of Alabama v. Smith. This issue is not even encompassed by the Sixth Circuit's judgment below from which the instant petition has been made.

After having failed to raise this specific issue at any time before the Sixth Circuit Court of Appeals, and after having failed to raise anything like this issue in its first Petition for Writ of Certiorari which led to the remand and "further consideration in light of Alabama v. Smith," the State of Tennessee should not be permitted to invoke the jurisdiction of this Court to address now the first question it has now presented for this Court's review.

The first issue now raised by the State of Tennessee in the instant and second Petition for Writ of Certiorari is not properly before this Court and the State's petition should be denied.

II. ALABAMA V. SMITH SHOULD HAVE NO EFFECT ON THE ORIGINAL DETERMINATION OF THE DISTRICT COURT AND SIXTH CIRCUIT COURT OF APPEALS THAT "THE APPROPRIATE REMEDY FOR THE DEPRIVATION OF TURNER'S SIXTH AMENDMENT RIGHTS WOULD BE A NEW PLEA HEARING DURING WHICH A REBUTTABLE PRESUMPTION OF VINDICTIVENESS WOULD ATTACH TO ANY PLEA OFFER MADE BY THE STATE IN EXCESS OF ITS ORIGINAL TWO-YEAR OFFER."

In its first opinion, 858 F.2d at 1208-1209, the Sixth Circuit Court of Appeals concluded as follows:

> Granting Turner another trial would not adequately remedy Turner's constitutional deprivation. On the other hand, requiring specific performance of the original two-year plea arrangement might unnecessarily infringe on the competing interest of the State." By allowing the State to withdraw the two-year plea offer upon showing that such a withdrawal is not the product of prosecutorial vindictiveness, the district court has struck the balance prescribed by United States v. Morrison [449 U.S. 361, 364, 101 S.Ct. 665, 668 (1981)].

Alabama v. Smith should not otherwise qualify this analysis. Moreover, Alabama v. Smith should not affect the finding that a "realistic likelihood" of prosecutorial retaliation exists which "demands application of a rebuttable presumption of vindictiveness to any plea offer made by the State in excess of its previous offer on the eve of the first trial." Turner v. Tennessee, 664 F. Supp. at 1125.

The issue in Alabama v. Smith was whether a presumption of **judicial** vindictiveness arose by the imposition of a second heavier sentence which followed a full trial that occurred after an original lighter sentence based upon a guilty plea had been set

aside on appeal. The reason the guilty plea was vacated was not because defendant received constitutionally deficient counsel at plea bargaining, but because defendant had been misinformed by the trial judge of the penalties associated with the crimes to which he had pleaded guilty.

This Court distinguished its prior decision of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969), and found that under the circumstances presented, there was not a "reasonable likelihood" that the increase in sentence was the product of actual vindictiveness on the part of the sentencing authority. Therefore, where there is no such "reasonable likelihood," a presumption of vindictiveness does not apply, and the burden remained upon the defendant to prove a due process violation by showing actual vindictiveness on behalf of the trial judge in imposing the heavier sentence.

In Alabama v. Smith, this Court found that there affirmatively appeared viable reasons for the trial judge to impose a more severe sentence upon the Defendant after his first and only trial. Contrasting to the sentencing information available to the judge after the guilty plea was considerably more information induced by the proof at trial. The trial gave the trial judge a fuller understanding of the nature and extent of the crimes charged than he had when the prior guilty plea was entered. Moreover, defendant's conduct during trial gave the trial judge greater insight into defendant's moral character and suitability for rehabilitation, factors unavailable at the taking of the guilty

plea. Finally, after trial and unlike the guilty plea scenario, factors that may have indicated to the trial judge a need for leniency in response to the guilty plea were no longer present.

Accordingly, this Court concluded that in an Alabama v. Smith context, a trial judge is not merely "doing over what it thought it had already done correctly," a predicate to invoking the presumption as set forth in United States v. Goodwin, 457 U.S. 368, 373, 102 S.Ct. 2485, 2489, 73 L.Ed. 2d 74, 80 (1982).

This Court then limited its holding as follows:

> Each of these factors distinguishes the present case, and others like it, from cases like Pearce. There, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness. **In cases like the present one**, however, we think there are enough justifications for a heavier sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by a vindictiveness.

The Turner case is **not** in any way a case "like the present one"--Alabama v. Smith. In Turner, it is undisputed that Mr. Turner is entitled to a constitutional remedy to cure the taint of his loss of the original two-year plea offer. Moreover, the Turner case deals with a "reasonable likelihood" of vindictiveness by the State's prosecutor, not a trial judge. In the Turner case, the State's prosecutor without giving any "objective, on--the--record explanations" based on "new facts or evidence," has substantially increased the severity of the punishment he would require in exchange for a guilty plea (1) **after** the original two-year offer was rejected because of constitutionally incompetent counsel but

never withdrawn by the State pretrial, (2) after a trial had already occurred once and fully exposed the nature and extent of Turner's conduct, (3) after Turner's convictions had been subsequently vacated because of the pretrial right to counsel violation and (4) after all state courts concluded that Mr. Turner was entitled to some constitutional remedy because of said violation.

The concerns not present in Alabama v. Smith are, therefore, still present in the Turner case. These are (1) the duplication of "prosecutorial resources," (2) asking a prosecutor "to do over what it thought it had already done correctly," and (3) the institutional bias inherent in the system against the retrial of issues that have already been decided." See, United States v. Goodwin, 457 U.S. at 373, 376-377, 388, 102 S.Ct. at 2489, 2490-2491, 2494, 73 L.Ed. 2d at 80, 82-82, 87 (1982). As a result, the Sixth Circuit Court's reasoning at 858 F.2d at 1208 in its first opinion remains in tact. See also, 940 F.2d at 1002, wherein the Sixth Circuit Court of Appeals states:

> We find nothing in Alabama v. Smith to disturb the Court's prior holding in Goodwin, and therefore our position remains consistent that Goodwin requires a presumption of prosecutorial vindictiveness in this case. Turner v. Tennessee, 858 F.2d at 1208.

Alabama v. Smith does not make new constitutional law, but merely addresses a different factual context within the vindictiveness progeny. The Turner case should not be factually controlled by Alabama v. Smith. In fact, the Turner case and the presumption of prosecutorial vindictiveness which will apply at the

later state court hearing is supported by Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974), and Thigpen v. Roberts, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed. 2d 23 (1984). In both cases, this Court invoked the presumption of vindictiveness where a State's prosecutor increased the severity of the criminal charges during the post-conviction stage after a trial had already occurred upon the original, more lenient charge. In both those cases, the new charges covered the same conduct for which the defendants had been tried and convicted and no new facts or new evidence which were not the direct fruits of the previous trial were available to support the prosecutor's "upping the ante" the second time around. Accordingly, this Court established a presumption of unconstitutional vindictiveness in the circumstances." Thigpen v. Roberts, 468 U.S. at 30, 104 S.Ct. at 2918.

These exact circumstances are present in the Turner case and consistent application of this Court's precedent requires invocation of the presumption of prosecutorial vindictiveness on remand at the remedial state court hearing. As Mr. Turner has consistently contended at every tier of state and federal litigation, the issue of prosecutorial vindictiveness was dutifully raised over six (6) years ago in the original motion to reinstate or dismiss of February 14, 1985. Turner v. Tennessee, 664 F. Supp. at 1118. (Joint Appendix pp. 42-43). In the state trial court's original order of reinstatement, the state court found as a fact after an evidentiary hearing as follows: "The State has offered no

real explanation as to why the offer is now twenty (20) years instead of two (2) years." 664 F. Supp. at 115. (Joint Appendix p. 46). Time and time again, the State of Tennessee has had opportunity after opportunity to make an explanation to rebut the charge of prosecutorial vindictiveness in each and every pleading since Mr. Turner filed his original motion, but it has still offered no such explanation at any stage of this litigation, both state and federal.

Having once failed to make a showing in response to the original motion, the State of Tennessee cannot rescind the two (2) year plea bargain unless it can show "objective evidence supporting a non-vindictive increase." 664 F. Supp. at 1126. **This is exactly what this Court pointed out when it upheld the presumption of prosecutorial vindictiveness in Thigpen v. Roberts as follows:**

> The State had ample opportunity to rebut it but did not do so. Its only argument has been that Blackledge should not apply.

468 U.S. 27, 32 n.6, 104 S.Ct. 2916, 2920 n.6, 82 L.Ed. 2d 23, 30 n.6.

Without the presumption of prosecutorial vindictiveness at the remedial state court hearing, the State of Tennessee would, in effect, never be required to honor the constitutionally mandated remedy due Mr. Turner. The opportunity to present the plea bargain for acceptance by the trial court through **competent** counsel can only occur after the original two (2) year offer is reinstated. See, State, ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982). Requiring the State of Tennessee to overcome a presumption

of prosecutorial vindictiveness ensures that it does not take advantage of Mr. Turner, who has suffered a serious constitutional loss.

Accordingly, upon further consideration in light of Alabama v. Smith, the Petition for Writ of Certiorari of the State of Tennessee should be denied.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true a correct copy of the foregoing has been furnished C. Anthony Daughtry, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485 this 13 day of December, 1991.

J. Russell Heldman

c:JRH10/alm

No. _____

In The
Supreme Court of the United States
October Term, 1988

STATE OF TENNESSEE,

Petitioner,

vs.

JAMES HOWARD TURNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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EXHIBIT 1

QUESTION PRESENTED FOR REVIEW

Whether a presumption of prosecutorial vindictiveness is applicable where the prosecutor has tendered the respondent a plea offer embodying a substantial reduction in the charges pending against the respondent and the permissible punishment for such charges?

No. _____

In The
Supreme Court of the United States
October Term, 1988

STATE OF TENNESSEE,

Petitioner,

vs.

JAMES HOWARD TURNER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on October 7, 1988, and is cited at 858 F.2d 1201. This opinion appears as Appendix A.[1]

[1] As of this date, the petitioner does not have access to the reported opinion of the United States Court of Appeals for the Sixth Circuit. The petitioner has therefore reproduced the opinion in its original form as Appendix A.

The published memorandum opinion and order of the United States District Court for the Middle District of Tennessee were filed on June 12, 1987, and are cited at 664 F.Supp. 1113. This memorandum opinion and order appear as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 7, 1988. This petition was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The respondent was indicted by the Grand Jury for Davidson County, Tennessee, on charges of first-degree murder and two (2) counts of aggravated kidnapping in connection with the 1980 murder of Monty Hudson and the

kidnapping of Monty Hudson and Elizabeth Hudson. Prior to trial, the prosecutor tendered to the respondent an offer of two (2) years imprisonment in exchange for his plea of guilty to simple kidnapping. Acting upon the advice of one of his retained counsel, and against the advice of his other retained counsel, the respondent rejected the prosecutor's plea offer and elected to be put to trial.

Thereupon, on February 9, 1983, the respondent was convicted in a jury trial of the crime of first-degree murder, receiving a sentence of life imprisonment. The respondent was also convicted of two (2) counts of aggravated kidnapping, and was sentenced to serve forty (40) years incarceration on each count. The state trial court ordered these sentences to be served concurrently.

Following his conviction, the respondent filed a motion for a new trial in the state trial court alleging that his Sixth Amendment right to the effective assistance of counsel was violated by the services rendered by counsel during the plea bargaining process. On October 26, 1983, the state trial court granted the respondent a new trial, finding that the respondent had been denied effective assistance of counsel where one of his retained counsel did not affirmatively advise the respondent to accept the prosecutor's offer of two (2) years' imprisonment in exchange for a plea of guilty to simple kidnapping.

On August 7, 1984, the Tennessee Court of Criminal Appeals affirmed the judgment of the state trial court granting the respondent a new trial, and the case was remanded for a new trial. *State v. James Howard Turner*, Davidson Criminal, C.C.A. No. 83-278-III (Opinion released August 7, 1984, at Nashville). The Tennessee Su-

preme Court thereafter denied the state's application for permission to appeal on December 14, 1984.

On remand to the state trial court, the respondent and the prosecutor engaged in plea negotiations wherein the prosecutor offered the respondent a sentence of twenty (20) years in exchange for his plea of guilty to the crime of aggravated kidnapping. The respondent countered with an offer to plead guilty to the crime of simple kidnapping, with a maximum sentence of ten (10) years. When it appeared that no agreement could be reached between the prosecutor and the respondent, plea negotiations terminated.

Subsequent to the termination of the plea negotiations, the respondent filed a "Motion to Reinstate Plea Offer, or in the Alternative, to Dismiss the Indictment" in the state trial court. Finding that a new trial would not effectively remedy the constitutional violation occasioned by counsel's inadequate representation, the state trial court granted the respondent's motion. In granting the respondent's motion, the state trial court specifically held that the prosecutor's offer of twenty (20) years was not tainted by vindictiveness.

Much aggrieved by the state trial court's grant of relief, the state filed an application for extraordinary appeal by permission in the Tennessee Court of Criminal Appeals. The Tennessee Court of Criminal Appeals granted the state's application and reversed the judgment of the state trial court on January 16, 1986. In reversing the judgment of the state trial court, the Tennessee Court of Criminal Appeals remanded the case for a new trial. *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986).

The Tennessee Supreme Court subsequently denied the respondent's application for permission to appeal on June 2, 1986.

The respondent thereafter filed a petition for the writ of certiorari in this Court. The Court denied the respondent's petition on November 3, 1986. *Turner v. Tennessee*, 479 U.S. 933 (1986).

On February 25, 1987, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee. Finding that a presumption of prosecutorial vindictiveness applies to any plea offer greater than the original offer of two (2) years, the district court granted the respondent habeas corpus relief:

> For the reasons stated in the accompanying Memorandum, the writ of habeas corpus shall issue within 30 days unless the trial court holds a plea hearing at which (1) petitioner has an opportunity, if he chooses, to present the former two-year offer as a presumptively completed plea agreement for consideration by the court; and (2) the prosecutor has the opportunity, if he chooses, to seek recision of the putative agreement conditioned upon an objective showing sufficient to rebut the presumption of prosecutorial vindictiveness under the *Blackledge v. Perry* [, 417 U.S. 21 1972)] line of precedents. Of course, the trial judge is otherwise free to accept or reject any plea agreement offered, including the two-year plea, in accordance with the criteria otherwise applicable under substantive and procedural law.

Turner, 664 F.Supp. at 1126. (Appendix B, at A52). The judgment of the district court was affirmed by the United States Court of Appeals for the Sixth Circuit on October 7, 1988. *Turner*, 858 F.2d at —. (Appendix A, at A16).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously determined that a presumption of prosecutorial vindictiveness is applicable where the prosecutor has tendered to the respondent a plea offer embodying a substantial reduction in the charges pending against the respondent and the permissible punishment for such charges.

In an opinion without precedent, the Court of Appeals determined that a rebuttable presumption of prosecutorial vindictiveness applies to any plea offer made by the prosecutor in excess of his prior offer of two (2) years. To remedy the alleged due process violation, the Court of Appeals fashioned what the district court termed a "presumptively completed plea agreement," thereby effectively granting the respondent specific performance of the rejected plea offer conditioned upon the prosecutor establishing by objective evidence a non-retaliatory motive.

The petitioner recognizes the principle that where a convicted defendant has successfully availed himself of his statutory or constitutional rights to obtain direct or collateral relief from his conviction, the prosecution may not institute additional or more severe charges against the defendant which pertain to the same criminal episode in order to punish the defendant for exercising his rights or to discourage other defendants from exercising their rights. *See, e.g., United States v. Goodwin*, 457 U.S. 368 (1982); *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

While a presumption of prosecutorial vindictiveness may apply where the prosecution institutes additional or more severe charges against a defendant under the aforementioned circumstances, it is clear that such a presumption has no applicability to circumstances where the prose-

cution has not instituted additional or more severe charges against the defendant. *See, e.g., Vardes v. Estelle,* 715 F.2d 206, 213 (5th Cir. 1983); *Miracle v. Estelle,* 592 F.2d 1269, 1275 (5th Cir. 1979); *United States v. Brooklier,* 685 F.2d 1208, 1215 (9th Cir. 1982), *cert. denied* 459 U.S. 1206 (1983); *United States v. Gallegos-Curiel,* 681 F.2d 1164, 1168 (9th Cir. 1982); *United States v. Rosales-Lopez,* 617 F.2d 1349, 1357 (9th Cir. 1980).

In the case at bar, the prosecutor did not institute additional or more severe charges against the respondent. Rather, by tendering a twenty (20) year plea offer, the prosecutor actually reduced the charges pending against the respondent from first-degree murder and two (2) counts of aggravated kidnapping to one (1) count of aggravated kidnapping. In offering the respondent this particular bargain, the prosecutor also dramatically reduced the permissible range of punishment for these charges from three (3) consecutive terms of life imprisonment to a mere twenty (20) years' incarceration.

The circumstances of the instant case are remarkably similar to the circumstances present in *United States v. Osif,* 789 F.2d 1404 (9th Cir. 1986). Osif was charged with first-degree murder; prior to trial, the prosecutor offered Osif a ten (10) year sentence in exchange for his plea of guilty to second-degree murder. Osif rejected this offer and was subsequently convicted of first-degree murder.[2] *Id.*, at 1404. On appeal from this conviction, Osif was granted a new trial. 753 F.2d 1085 (1985).

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[2] The Court of Appeals' opinion is silent as to the length of the sentence Osif received upon his conviction for first-degree murder. However, the opinion does reflect that this sentence was greater than the fifteen (15) year sentence imposed upon Osif's conviction for second-degree murder. *Id.*, at 1405 n. 2.

On remand, the prosecutor offered Osif a fifteen (15) year sentence in exchange for his plea of guilty to second-degree murder. Osif accepted this offer and entered a plea of guilty in accordance with the terms of the plea bargain.

On appeal from his plea of guilty, Osif claimed that the district court erred in refusing to compel the government to reinstate the previously rejected plea offer and in declining to find vindictiveness in the government's refusal to resubmit the original offer. *Id.*, at 1404-1405. Rejecting Osif's reliance upon *Blackledge*, *Pearce* and "their progeny," the Court of Appeals for the Ninth Circuit held that the government was under no obligation to reinstate the original plea offer. *Id.*, at 1405.

The court further opined that Osif's claim of prosecutorial vindictiveness was without substance:

> . . . [T]he vindictive prosecution doctrine does not apply when neither the charge's severity nor the sentence is increased. [Citation omitted]. Here, neither the sentence nor the charge was increased. Rather, the government merely refused to reoffer, after an intervening conviction for first-degree murder, as lenient a bargain as was previously rejected by Osif prior to trial.
>
> Further, vindictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action. [Citations omitted]. Osif's intervening first-degree murder conviction, . . . , is an intervening circumstance that properly could cause the prosecutor to view a new plea offer in a different light. Under any standard of review, we cannot find government vindictiveness.

Id.

While the petitioner contends that the rationale of the *Osif* decision is persuasive and should control the result

of the instant case, there are other reasons which compel the conclusion that there is no reasonable likelihood of vindictiveness on the part of the prosecutor in tendering a plea offer involving more than two (2) years' incarceration. Most significantly, the concept of prosecutorial vindictiveness is foreign to the plea bargaining process, where both parties possess relatively equal bargaining power and where the respondent is free to accept or reject the prosecutor's offer without exposing himself to greater or additional charges under the facts of this case. *See Bordenkircher v. Hayes*, 434 U.S. 363, 365 (1978).

Moreover, the prosecutor's desire to forego a jury trial by engaging in plea negotiations (despite knowledge that he has sufficient proof to convict the respondent of first-degree murder and two (2) counts of aggravated kidnapping, thereby exposing the respondent to possible punishment of three (3) consecutive life sentences) is constitutionally legitimate where there is no dispute but that the respondent is properly charged with first-degree murder and two (2) counts of aggravated kidnapping. *Id.*

Finally, the remedy devised by the Court of Appeals creates an anomalous situation: Although the court found that any offer greater than two (2) years evinces prosecutorial vindictiveness, the respondent himself is willing to accept a sentence of ten (10) years.

For these reasons, the petitioner submits that the Court of Appeals erred in according a mere plea offer constitutional significance by applying a presumption of prosecutorial vindictiveness to any subsequent plea offer greater than the original, unconsummated offer of two (2) years.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989
NO. 88-1063

STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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EXHIBIT 2

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, JAMES HOWARD TURNER, respectfully contends that the Petition for Writ of Certiorari filed in this Court by the State of Tennessee should be denied. This case does not depart from established case law. Neither does it offend this Court's decision in Bordenkircher v. Hayes, 434 U.S. 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1968).

The issue raised by the State of Tennessee on the applicability of the presumption of prosecutorial vindictiveness at the state trial court hearing ordered by the District Court at 664 F. Supp. at 1126 must be addressed within the peculiar and special factual circumstances which have guided the federal courts below. The basic predicate fact is that Mr. Turner was denied his constitutional right to counsel at plea bargaining when his original trial counsel advised him to reject a generous two (2) year plea offer to simple kidnapping and go to trial. At trial, he was convicted of murder and two (2) counts of aggravated kidnapping and sentenced to life plus two (2) forty (40) year sentences. These convictions were vacated by the state trial and appellate courts which held that Mr. Turner was denied effective assistance of counsel when he was advised to reject the original offer. This violation required a constitutional remedy on remand.

What distinguishes this case from all the cases cited by the State of Tennessee is that the presumption of prosecutorial vindictiveness is necessary to insure that the previous constitutional violation is remedied. The appropriate remedy to cure the taint of Mr. Turner's loss during plea bargaining requires that Mr. Turner be permitted to present the original two

(2) year plea bargain to the state trial court for approval. A presumption of prosecutorial vindictiveness must apply to the remedial hearing ordered by the federal courts to insure that any decision by the State's prosecutor to rescind the two (2) year plea bargain comports with due process. Otherwise, Mr. Turner would have suffered a constitutional violation without an adequate constitutional remedy. Therefore, when the factual background of this case is presented, the issue raised by the State does not take on the radical implications that the State suggests.

All state and federal courts have unanimously held that Mr. Turner was denied his constitutional right to counsel during the original plea bargaining phase of this case when his original trial counsel, Lance Bailey, incompetently advised him to reject the State prosecutor's two (2) year plea offer to simple kidnapping and to proceed to go to trial on original charges of one (1) count of murder and two (2) counts of aggravated kidnapping. The state trial and appellate courts found that "any competent attorney would have advised the defendant to accept" the original two (2) years offer and Mr. Turner was granted a new trial. 664 F. Supp. at 1117 n. 11.

When the case was remanded and put back on the state trial court's docket, the State's prosecutor was unwilling to re-offer the original two (2) years sentence but would only offer twenty (20) years in exchange for a plea of guilty to aggravated kidnapping. Because the state courts had found that constitutionally incompetent counsel had prevented him from freely accepting the original two (2) year offer before the first trial and because that original offer was never withdrawn by the State prior to trial, Mr. Turner moved the state trial court to

order that the original two (2) year offer be reinstated so that a remedy for the right to counsel violation would be tailored to meet the constitutional injury suffered, citing U.S. v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981). 664 F. Supp. 1118. (Joint Appendix, pp. 42-43). Mr. Turner also argued in his motion for reinstatement that "[a]ny less drastic remedy other than the relief requested in this motion would violate defendant's state and federal due process rights to be protected from a realistic likelihood of prosecutorial vindictiveness or an apprehension of the same," citing Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), and its progeny.

After an evidentiary hearing, the state trial court granted the motion and ordered the State of Tennessee to reinstate the two (2) year offer or face dismissal of the case. The state trial court found that reinstatement was the only remedy available to neutralize the taint of the right to counsel violation during the original plea bargaining phase of the case. In its February 28, 1985, order of reinstatement, the state trial court further found as a fact as follows: "The State has offered no real explanation as to why the offer is now twenty (20) years instead of two (2) years." 664 F. Supp. at 1115. (Joint Appendix, p. 46).

The state appellate court subsequently reversed the state trial court's order of reinstatement upon finding that the state trial court had no authority to compel the State's prosecutor to make a particular plea offer under any circumstance. 713 S.W.2d at 330. After remand, Mr. Turner filed a petition for writ of habeas corpus in the District Court. Presented with this peculiar factual setting, the District Court granted the petition and this decision was affirmed by the Sixth Circuit Court of Appeals.

The District Court correctly reasoned that the mere grant of a new trial without reinstatement of the original two (2) year plea offer was insufficient to purge the taint of the previous constitutional violation adjudged. 664 F. Supp. at 1123-1124. Therefore, the District Court found that the subseqent offer of twenty (20) years to a plea of guilty to aggravated kidnapping fell far short of making Mr. Turner constitutionally whole. Therefore, the District Court found under these peculiar circumstances that the original two (2) year plea bargain was "presumptively mandated" and that at a remedial hearing to be held before the state trial court, Mr. Turner could present the two (2) year plea bargain to the state trial judge for approval. 664 F. Supp. at 1124. Then Mr. Turner will have been provided a constitutional remedy "tailored to the injury" according to the U.S. v. Morrison mandate. 664 F. Supp. at 1125.

Having ordered the remedial plea hearing, the District Court outlined how the State's prosecutor could rescind the original two (2) year offer without offending the constitutionally mandated remedy of reinstatement. 664 F. Supp at 1124. It is at the remedial state court hearing that the State's prosecutor can choose to rescind the two (2) year agreement by showing through "objective evidence" that rescission is justified and not purely based on vindictive motives. 664 F. Supp. at 1125. Then the District Court wrote: "Now that the petitioner's constitutional infirmity has been cured and he has been provided competent counsel, the State is free to withdraw the offer, so long as that withdrawal is free of a reasonable apprehension of vindictiveness." Id. As the Sixth Circuit properly added, the balancing of interests prescribed by U.S. v. Morrison is accommodated "by allowing the State to withdraw the

two-year plea offer upon showing that such a withdrawal is not the product of prosecutorial vindictiveness" at the remedial hearing. 6th Cir. Slip Opinion, p. A16.

It is precisely this goal of adequately remedying Mr. Turner's constitutional deprivation while not infringing on the discretionary interest of the State of Tennessee which sets this peculiar case apart from the facts presented in Bordenkircher v. Hayes, 434 U.S. 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1968) and U.S. v. Osif, 789 F.2d 1404 (9th Cir. 1988).

The presumption of prosecutorial vindictiveness established in Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), and having its roots in North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), was addressed for the first time by this Court in a pretrial setting in the Bordenkircher v. Hayes case. The Bordenkircher Court held that due process did not prohibit a prosecutor from carrying out a threat, made during initial plea negotiations, to bring additional charges against a defendant who refused to plead guilty to an offense with which he was originally charged. Bordenkircher v. Hayes held that North Carolina v. Pearce and Blackledge v. Perry were distinguishable where the prosecutor's action did not amount to a "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction," the circumstance which North Carolina v. Pearce and Blackledge v. Perry addressed. 434 U.S. at 362, 98 S. Ct. at 667, 54 L. Ed. 2d at 610.

This Court further found that there was no Blackledge v. Perry element of punishment in the "give-and-take" of plea negotiations "so long as the accused is free to accept or

reject the prosecution's offer." 434 U.S. at 363, 98 S. Ct. at 668, 54 L. Ed. 2d at 611. The Court wrote: "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." 434 U.S. at 365, 98 S. Ct. at 669, 54 L. Ed. 2d at 612. (Emphasis added). The Court further distinguished that it was not reviewing a situation "where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360, 98 S. Ct. at 666, 54 L. Ed. 2d at 609.

One basic fact then clearly distinguishes the Turner case from Bordenkircher v. Hayes: because Mr. Turner received constitutionally incompetent advice to reject the original two (2) year plea offer, Mr. Turner was never "free to accept or reject" the State prosecutor's original offer. When the State's prosecutor upped the offer to twenty (20) years after a new trial was granted because of the constitutional violation, the situation that this Court was careful to say was not being addressed in Bordenkircher v. Hayes arose in Mr. Turner's case. That is, the State's prosecutor had increased the sentence offer from two (2) to twenty (20) years and the plea bargain charge from simple to aggravated kidnapping "after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360, 98 S. Ct. at 666, 54 L. Ed. 2d at 609. Accordingly, the federal courts below did not depart from the teachings of Bordenkircher v. Hayes. See 664 F. Supp. at 1125 n. 33.

Neither did the federal courts render a decision in conflict with the Ninth Circuit Court of Appeals' decision in U.S. v. Osif. U.S. v. Osif required nothing more than a straightforward application of this Court's analysis in Bordenkircher v. Hayes. In U.S. v. Osif, there was no violation of the right to counsel at plea bargaining which required a remedy of reinstatement of the original plea offer at the subsequent trial. There was no obligation from the State's prosecutor to re-offer the original bargain to insure that a constitutional remedy be provided Osif. All that reversal of the original conviction required was a new trial and the refusal of the prosecutor in U.S. v. Osif to re-offer a previously rejected plea offer was not necessary to remedy a constitutional violation as the federal courts have explained in the instant case.

The reason for the invocation of the presumption of prosecutorial vindictiveness in the Turner case is best explained by the "structural analysis" that this Court used in U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. at 2485, 70 L. Ed. 2d 74 (1982). See 664 F. Supp. at 1125 and 6th Cir. Slip Opinion, pp. A15-A16. Both the District Court and the Sixth Circuit Court of Appeals utilized these guidelines in requiring the State of Tennessee to produce "objective evidence" at the remedial state trial court hearing if the State's prosecutor chooses to seek rescission of the "presumptively mandated" two (2) year plea bargain.

The Goodwin Court emphasized that in a post-conviction context where the Blackledge v. Perry concern of "duplicative expenditures of prosecutorial resources" and the North Carolina v. Pearce concern of asking a party "to do over what it thought

it had already done correctly" are present, the Court will "presume" an improper vindictive motive where "action detrimental to the defendant has been taken after the exercise of a legal right." 457 U.S. at 373, 383, 102 S. Ct. at 2489, 2494, 73 L. Ed. 2d at 80, 87. Moreover, if "the institutional bias inherent in the judicial system against the re-trial of issues that have already been decided" is present, "the same institutional pressure . . . might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a re-trial of decided question." 457 U.S. at 376-377, 383, 102 S. Ct. at 2490-2491, 2494, 73 L. Ed. 2d at 82-83, 87.

Finally, the Court held that the presumption is especially warranted after a defendant has been through a trial and the State has had the opportunity to fully discover and assess all of the information against him, concluding that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." 457 U.S. at 381-382, 102 S. Ct. at 2493, 73 L. Ed. 2d at 85.

As the District Court and the Sixth Circuit Court of Appeals have pointed out, all the above Goodwin criteria were present at the time Mr. Turner's motion for reinstatement was made, thereby requiring a presumption of prosecutorial vindictiveness to attach and compel the prosecutor to rebut the presumption if rescission of the plea bargain is sought. 664 F. Supp. at 1125. Unlike Bordenkircher v. Hayes, the Goodwin concerns of (1) duplicating "prosecutorial resources," (2) asking a prosecutor "to do over what it thought it had done correctly," and (3) "the institutional bias inherent in the system against

the re-trial of issues that have already been decided" were all present when on remand from the grant of new trial, the State's prosecutor upped Mr. Turner's offer to twenty (20) years from two (2) years. The increase in the sentence offer came after the State had extended Mr. Turner two (2) years originally, after it was rejected on advice of incompetent counsel but never withdrawn by the State pretrial, after a trial had already occurred once, after Mr. Turner's convictions had been subsequently vacated and after the state appellate courts affirmed the original findings of a right to counsel violation at plea bargaining. With these peculiar facts presented to the District Court at this juncture, it correctly held "that the structural analysis of Goodwin requires a finding of a realistic likelihood of vindictiveness in this situation and demands application of a rebuttable presumption of vindictiveness to any plea offer made by the State in excess of its previous offer on the eve of the first trial." 664 F. Supp. at 1125.

This Court should further accord the state trial court's findings of fact the presumption of correctness due under 28 U.S.C. §2254(d) in denying the State's petition. See Wainwright v. Witt, 469 U.S. 412, 425, 105 S. Ct. 844, 853, 88 L. Ed. 2d 841 (1985). The issue of prosecutorial vindictiveness was raised by Mr. Turner in his original motion to reinstate or dismiss of February 14, 1985. 664 F. Supp. at 1118. (Appendix, pp. 42-43). In the state trial court's order of reinstatement, it found as a fact after an evidentiary hearing as follows: "The State has offered no real explanation as to why the offer is now twenty (20) years instead of two (2) years." 664 F. Supp. at 1115. (Joint Appendix, p. 46). Having once failed to make any showing to rebut the charge of prosecutorial vindictiveness in response

to the original motion, the federal courts have properly held that the State of Tennessee cannot rescind the two (2) year plea bargain unless at the remedial state court hearing it can show "objective evidence supporting a non-vindictive increase." 664 F. Supp. at 1126. See also Thigpen v. Roberts, 468 U.S. 27, 32 n. 6, 104 S. Ct. 2916, 2920 n. 6, 82 L. Ed. 2d 23, 30 n. 6 (1984), wherein the presumption of prosecutorial vindictiveness was upheld by this Court: "The State had ample opportunity to rebut it but did not do so."

Mr. Turner further contends that without the presumption of prosecutorial vindictiveness at the remedial state court hearing order below, the State of Tennessee would in effect never be required to honor the constitutionally mandated remedy due Mr. Turner. The opportunity to present the plea bargain for acceptance by the trial court through competent counsel can only occur after the original two (2) year offer is reinstated and only the State of Tennessee can reinstate it. See State ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982). Reinstatement of the original offer "plac[es] the State and the accused in the same positions they would have been in had the impermissible conduct not taken place." Nix v. Williams, 467 U.S. 431, 447, 104 S. Ct. 2501, 2511, 81 L. Ed. 2d 377, 389 (1984); U.S. v. Bowers, 517 F. Supp. 666, 672 (W.D. Pa. 1981).

Requiring the State to overcome a presumption of prosecutorial vindictiveness insures that the State of Tennessee does not take advantage of Mr. Turner who has suffered a serious constitutional loss. Otherwise, the State's prosecutor may without any constitutional accountability be allowed to rescind the offer. Mr. Turner submits that such action by the State's prosecutor would violate the State's "affirmative obligation not

to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." See Maine v. Moulton, -- U.S. --, 106 S. Ct. 477, 485, 88 L. Ed. 2d 481, 493 (1985).

At the very least, the federal courts have remanded this case to a state trial court judge wherein he must first decide whether or not to approve the two (2) year plea agreement. Since the issue raised by the State of Tennessee depends upon the happening of this contingency, this case may not be ripe for this Court to exercise its powers of review at this juncture. Nevertheless, Mr. Turner submits that the decision of the District Court and the affirmance by the Sixth Circuit Court of Appeals is properly supported by precedent and does not offend the legitimate competing interests of the State of Tennessee.

The petition for writ of certiorari should therefore be respectfully denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Kymberly Lynn Anne Hattaway, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, this 16 day of March, 1989.

J. Russell Heldman